Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

-v.-

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RENEE SCHWARTZ
Counsel of Record
EZIO SCALDAFERRI
BOTEIN HAYS & SKLAR
200 Park Avenue
New York, New York 10166
(212) 867-5500

Attorneys for Petitioner

QUESTIONS PRESENTED

Whether the term "public body" as used in the Niagara Redevelopment Act includes a government agency which uses the hydropower itself but does not resell the hydropower to other consumers of electricity.

Whether in interpreting the provisions of the Niagara Redevelopment Act, the Federal Energy Regulatory Commission is required to harmonize that interpretation with national policies in favor of conservation and mass transportation.

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The following parties may have an interest in the outcome of this proceeding:

Federal Energy Regulatory Commission
Power Authority of the State of New York
Connecticut Municipal Electric Energy Cooperative
Allegheny Electric Cooperative, Inc.
New Jersey Board of Public Utilities
Boston Edison Company
Eastern Edison Company
Fitchburg Gas and Electric Light Company
Massachusetts Electric Company
Municipal Electric Utilities Association of New York State
Vermont Department of Public Service
Public Service Electric and Gas Company
Massachusetts Municipal Wholesale Electric Company
City of Cleveland, Ohio
Bethlehem Steel Corporation
Borough of Lansdale
Arlene Violet, Attorney General of Rhode Island and Rhode Island Public Utilities Commission
Sussex Rural Electric Cooperative
Rockland Electric Company
New Jersey Preference Boroughs
General Motors Corporation
Occidental Chemical Corporation
Olin Corporation
Union Carbide Corporation

Attorneys for the above parties and the Solicitor General have been served with copies of this petition.

The Metropolitan Transportation Authority ("MTA"), petitioner herein, is a public benefit corporation created under the laws of the State of New York. N.Y. Pub. Auth. L. § 1263(1)(a). Members of the MTA's board serve *ex officio* as members of the boards of the following entities:

New York City Transit Authority
Metro North Commuter Railroad Co.
Long Island Railroad
Triborough Bridge and Tunnel Authority
Staten Island Rapid Transit Authority
Manhattan and Bronx Surface Transit Operating Authority

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE OUTCOME OF THIS CASE AFFECTS THE ALLOCATION OF MILLIONS OF DOLLARS OF VALUABLE ASSETS AND SHOULD NOT TURN ON A STRAINED INTERPRETATION OF LEGISLATIVE HISTORY	7
II. THE DEFINITION OF "PUBLIC BODY" UNDER THE NRA AND OTHER FEDERAL POWER ACTS IS AN ISSUE OF FIRST IMPRESSION, AND SHOULD BE DECIDED BY THE COURT NOW TO AVOID POSSIBLE IRREPARABLE INJURY TO OTHER GOVERNMENT AGENCIES WHICH MAY BE ELIGIBLE FOR HYDROPOWER ALLOCATIONS UNDER THE NRA OR OTHER FEDERAL PREFERENCE STATUTES	9
III. THE SECOND CIRCUIT'S INTERPRETATION OF THE NRA VIOLATES THE PLAIN MEANING RULE OF STATUTORY CONSTRUCTION; MOREOVER, IF ANY LEGISLATIVE HISTORY IS TO BE CONSIDERED, IT HAS BEEN MISCONSTRUED	11
IV. FERC IS REQUIRED TO CONSIDER FEDERAL POLICIES IN FAVOR OF MASS TRANSPORTATION AND ENERGY CONSERVATION IN REVIEWING THE POWER AUTHORITY'S ALLOCATIONS UNDER THE NRA	20
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	PAGE
American Federation of Musicians v. *Wittstein*, 379 U.S. 171 (1964)	9
Appalachian Power Co. v. *United States*, 607 F.2d 935 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980)	20
Bread Political Action Committee v. *FEC*, 455 U.S. 577 (1982)	13
Burnet v. *Guggenheim*, 288 U.S. 280 (1933)	18
Chapman v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979)	12-13
Chemical Mfrs. Ass'n v. *Natural Resources Defense Council*, 470 U.S. 116 (1985)	12
City of Santa Clara v. *Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978)	21-22
Consumer Product Safety Commission v. *GTE Sylvania Inc.*, 447 U.S. 102 (1980)	13
Eck v. *United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966)	18
Forelaws on Board v. *Johnson*, 743 F.2d 677 (9th Cir. 1984), *cert. denied*, U.S. , 106 S. Ct. 3293 (1986)	22-23
General Motors Corp. v. *District of Columbia*, 380 U.S. 553 (1965)	8
Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982)	13
Kossick v. *United Fruit Co.*, 365 U.S. 731 (1961)	9
MTA v. FERC,796 F.2d 584 (2d Cir. 1986)	*passim*
PASNY v. *FERC*, 743 F.2d 93 (2d Cir. 1984)	4,9
United States v. *Locke*, 471 U.S. 84 (1985)	13
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947)	8,9
United States v. *Turkette*, 452 U.S. 576 (1981)	12

PAGE

Regulatory Agency Opinions and Orders

Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time, 32 FERC (CCH) ¶ 61,194 (July 30, 1985) 4

Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York, 30 FERC (CCH) ¶ 61,323 (March 27, 1985) 4,7,17

Re Consolidated Edison Company of New York, 29 PUR 4th 327 (N.Y.P.S.C. 1979) 15-16

Re Test Periods In Rate Cases, 2 PUR 4th 611 (N.Y.P.S.C. 1977) 16

State of Vermont Public Service Board v. Power Authority of the State of New York, 55 F.P.C. 1109 (1976) 4

Statutes

Federal

Bonneville Project Act, 16 U.S.C. § 832 *et seq.* ... 9

Department of Energy Organization Act, 42 U.S.C. § 7112 (17) 12

Flood Control Act of 1944, 16 U.S.C. § 825 *et seq.* 9

Fort Peck Project Act, 16 U.S.C. § 833c 9

National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* 20-21

Niagara Redevelopment Act of 1957, 16 U.S.C. § 836 *et seq.* ..... *passim*

Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 2601 *et seq.* 21

Urban Mass Transportation Act of 1970, 49 U.S.C. § 1601 *et seq.* 21

State

N.Y. Pub. Auth. L. § 1001 3

N.Y. Pub. Auth. L. § 1009 15

N.Y. Pub. Auth. L. § 1260 3

N.Y. Pub. Auth. L. § 1264 3

PAGE

Legislative Materials

S. Rep. No. 141 95th Cong. 2d Sess. (1977), *reprinted in* 1978 U.S. Code & Cong. Ad. News 7659 21

103 Cong. Rec. 14439 (1957) 18-19

103 Cong. Rec. 14451 (1957) 19

Articles and Miscellaneous

Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 Vand. L. Rev. 395 (1950) 18

Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 Vand. L. Rev. 456 (1950) 18

E. Erlich, *Are Utilities Obsolete? A Troubled System Faces Radical Change*, Business Week, May 21, 1984 p. 117 17

Letter to the New York Times from Alfred Kahn, Former Chairman of the N.Y.S. Public Service Commission, November 25, 1983 p. 30 16

1985 Power Authority of the State of New York Ann. Rep. 44 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

-v-

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

This petition for a writ of *certiorari* seeks review by this Court of an opinion and judgment of the United States Court of Appeals for the Second Circuit filed June 17, 1986. *MTA* v. *FERC*, 796 F.2d 584 (2d Cir. 1986) (A1-A20).[1] A petition for rehearing and suggestion for rehearing *en banc* was denied by that court on August 6, 1986 (A21-A22).

The opinion affirmed two decisions of respondent Federal Energy Regulatory Commission ("FERC"), *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 FERC (CCH) ¶ 61,323 (March 27, 1985) (A49-A85) ("Opinion No. 229"), and *Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC (CCH) ¶ 61,194 (July 30, 1985) (A23-A48) ("Opinion No. 229-A"), which had affirmed, with modifications, *Initial Decision*

1. References to "A " are to the Appendix filed herein.

of the Administrative Law Judge, 22 FERC (CCH) ¶ 63,087 (March 9, 1983) (A86-A140).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 17, 1985. The Court of Appeals denied a petition for rehearing by order filed August 6, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision whose interpretation is at issue is Section 1(b)(1) of the Niagara Redevelopment Act of 1957, 16 U.S.C. § 836(b)(1), which provides in relevant part:

> In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance . . .

STATEMENT OF THE CASE

With the passage of the Niagara Redevelopment Act in 1957 ("NRA"), Congress authorized the Power Authority of the State of New York ("Power Authority") to finance, construct, and operate a hydroelectric power project on the Niagara River. 16 U.S.C. § 836. Because the river was considered a federal resource but the financial responsibility for the project was placed on New York state, a compromise was reached pursuant to which 50% of the power would be distributed under a federal preference to "public bodies and non-profit cooperatives" (with up to 20% of that part to be sold outside of New York State), and the other 50% would be distributed as determined by the Power Authority,

presumably to investor-owned utilities. *Id.* § 836(b). This petition arises as a result of the first judicial interpretation of the term "public bodies" as used to define preference customers in the NRA. *MTA* v. *FERC*, 796 F.2d 584 (2d Cir. 1986) (A1-A20).

The MTA is the New York State agency primarily responsible for substantially all of the mass transportation services in the New York Metropolitan area. It was established in 1965 to stabilize, improve and coordinate mass transportation services, and it provides overall coordination for a mass transit system which includes the New York City Transit Authority, Metro North, and the Long Island Railroad. N.Y. Pub. Auth. L. §§ 1260, 1264. These entities annually carry roughly six times the population of the United States to and from work, shopping, family, etc. No one seriously questions that the MTA has all the indicia of and is considered a "public body" as that term is generally used.

The MTA is one of the largest users of electricity in the State of New York. Its annual electric bill is in excess of $110 million. The largest part of the power, approximately 85%, is used by the New York City Transit Authority to operate the subway system, the largest mass transportation system in the world. Prior to 1976, the MTA had been a tariff customer of investor-owned utilities. The energy crisis of the early 1970's, coupled with financial problems experienced by the investor-owned utilities, led the New York State legislature in 1976 to authorize the Power Authority to purchase generating facilities from Consolidated Edison and to serve certain designated public agencies, including the MTA. N.Y. Pub. Auth. L. § 1001. In accordance with the Power Authority's tariffs, the MTA may resell the power it purchases to its subsidiaries or affiliates, but it does not resell power to other users. *See* Power Authority Service Tariff No. 9, Paragraph D., pp. 11-12; R. 622-23.[2]

2. References to "R " are to the Deferred Appendix filed in the court below.

During 1976-81 the cost of conventional energy continued to rise. Therefore, in keeping with its effort to promote mass transportation by holding down as much as possible any rate increase to the MTA, in 1981 the Power Authority allocated to the MTA up to 35 mw and 175,000 mwh per year of interruptible Niagara hydropower. R. 535-36.

At roughly the same time, in March of 1980 certain out-of-state municipal utilities challenged as insufficient the amount of hydropower allocated to the out-of-state preference customers by the Power Authority. In determining whether out-of-state preference customers should receive a portion of or the total 10% of hydropower,[3] FERC reviewed the allocations of hydropower to in-state and other out-of-state preference customers. The question of the allocation of the hydropower, in turn, raised the question of whether the MTA, an end user of electricity, was a "public body" and hence a proper recipient of preference power under the NRA.

Throughout the first twenty or more years since the enactment of the NRA, FERC had given the term "public bodies" its plain meaning interpretation. *State of Vermont Public Service Board* v. *Power Authority of the State of New York*, 55 F.P.C. 1109 (1976); *see Opinion No. 229-A*, 30 FERC at 61,194 (A28). Ignoring the plain meaning of the words Congress used and its prior holdings, and relying on a decision of the Second Circuit in *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984) for guidance as to Congressional intent, FERC concluded here that the MTA was not a "public body" because "only publicly-owned distributors and sellers of electricity who are capable of selling and distributing this power to the people as consumers of electricity" qualified as public bodies. *Opinion No. 229*, 30 FERC at 61,652 (A67). The MTA and certain Massachusetts utilities[4] appealed FERC's decision on this point pursuant to 12 U.S.C. § 825L.

---

3. Section 836(b)(2) provides that the out-of-state entities should receive a reasonable portion up to 20% of the 50% of preference power.

4. 796 F.2d at 591 n.4. (A11)

The Second Circuit affirmed FERC's decision although it acknowledged that, read literally, the term "public body" would include government bodies like the MTA. 796 F.2d at 591 (A12).[5] Rather, the court emphasized what it believed to be the fundamental concept behind Congress' enactment of the NRA—"yardstick competition," a theory which suggests that if electric power were in "public" hands, privately owned utilities would be forced to lower their rates thereby benefitting the public at large. *Id.* at 591-92 (A12-A13). By its decision, the Second Circuit denied Niagara preference power and, by analogy, preference power under any other federal preference statute, to the MTA and to any other government agency which is not a reseller of energy.

5. The Second Circuit also affirmed FERC's holdings that (i) the term "neighboring states" should be read literally; and (ii) the out-of-state preference entities were not entitled to retroactive relief. 796 F.2d at 593-94 (A16-A20). The court declined to rule on the issue of whether the Power Authority must allocate 10% of the project power to out-of-state preference entities because the issue is "currently academic." *Id.* at 593 (A18). Those issues are not part of this petition.

REASONS FOR GRANTING THE WRIT

There are at least four reasons why the petition should be granted:

The determination affects an extremely valuable national resource and imposes millions of dollars of additional expense on the very government agencies that are least likely to be able to afford such expense.

The question of who may be considered a preference customer under a federal preference provision is a case of first impression. If the erroneous determination is permitted to stand, it will adversely impact government agencies nationwide that seek hydropower from federal projects with similar preference provisions. This Court should not wait for a conflict in the Circuits in interpreting the federal preference laws, because any delay may cause government agencies seeking preference power irreparable harm, since the hydropower allocations are not retroactive, and the government agencies might be excluded from receiving hydropower in the interim period.

The possibility of reversal on review is real. The statutory interpretation adopted below is inconsistent with plain meaning statutory interpretation rules previously announced by this Court. Further, even if it were correct not to use the plain meaning rule of statutory interpretation in this instance, the legislative history does not compel the conclusions which have been reached below.

Finally, in reviewing the NRA or other legislation allocating hydropower, FERC should be directed to interpret such acts consistently, if possible, with the policies set forth under the National Environmental Policy Act and the Urban Mass Transportation Act. FERC admittedly has considered neither the environment nor the importance of mass transportation in reaching its conclusions.

I.

THE OUTCOME OF THIS CASE AFFECTS THE ALLOCATION OF MILLIONS OF DOLLARS OF VALUABLE ASSETS AND SHOULD NOT TURN ON A STRAINED INTERPRETATION OF LEGISLATIVE HISTORY.

At least eighteen entities, plus FERC and the Power Authority, participated in the proceedings below. Some of the parties are associations with many members, bringing the total number of entities interested in obtaining the precious resource even higher.[6]

It is not surprising that so many parties have been willing to bear the expense of such a protracted litigation; the prize is worth it. If electricity is a significant element of the cost of providing service, then the ability to obtain hydropower is crucial. As FERC's Commissioner Stalon noted in his dissent, "[t]he Niagara Project's value to the preference customers is immense. [They] save several hundred million dollars annually by buying preference power instead of having to generate or purchase power at current cost." *Opinion No. 229*, 30 FERC at 61,659 (Stalon, dissenting) (A79).

The total savings from the allocation of hydropower differs from year to year depending on the actual amount of hydropower received, the base price of conventional energy, and the cost of alternate fossil fuel used to generate conventional energy. To use the example used before the Circuit Court, in 1985 the average price for conventional power purchased from the Power Authority was 6.4 cents per kilowatthour, while the price of the same unit of hydropower was less than four-tenths of a cent. In other words, the conventional power was *16* times more expensive than the hydropower. The difference between the two rates diminished in 1986 because both the Power Authority's conventional rate and the price of oil (the alternate fuel used to generate conventional energy) have dropped, but the rate difference as of September, 1986 was still very substantial—4¢ per kilowatthour.

6. The Second Circuit particularly noted the quantity of intervenors. *MTA* v. *FERC*, 796 F.2d 584, 588-89 n.3 (2d Cir. 1986) (A6).

for conventional fuel and 4.6 tenths of a cent per kilowatthour for hydropower.[7]

To put it another way, if 175,000 mwhrs of hydropower purchased from the Power Authority today cost approximately $800,000, an equivalent amount of conventional power would cost $7 million. During 1985, the Power Authority sold a total of over 14.6 billion kilowatthours from the Niagara project, roughly one half to preference customers. 1985 Power Authority of the State of New York Ann. Rep. 44. Thus, the savings to preference customers by reason of receiving hydropower (compared to the cost of Power Authority conventional power) could equal over a quarter of a billion dollars. That amount would of course increase if all the other hydropower projects with federal preference clauses were to be added.

While the fact that the stakes involved translate into hundreds of millions of dollars may not, standing alone, be a sufficient reason for *certiorari* review, the economic impact of the lower court's decision is an important factor in determining whether to grant the writ. *Cf. United States* v. *Standard Oil Co.* 332 U.S. 301, 302 n.2 (1947); *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 557 (1965). When the significant economic impact is coupled with both an error in statutory interpretation (*see* Point III, *infra*) and a failure to consider a potentially adverse impact on the environment (*see* Point IV, *infra*) the combination should be irresistible.

---

7. The Second Circuit took judicial notice of the decline in the price of oil as a source of private power, *MTA* v. *FERC*, 796 F.2d at 593 (A15), but that decline does not make the difference in cost unimportant, for that difference is still enormous.

II.

THE DEFINITION OF "PUBLIC BODY" UNDER THE NRA AND OTHER FEDERAL POWER ACTS IS AN ISSUE OF FIRST IMPRESSION AND SHOULD BE DECIDED BY THE COURT NOW TO AVOID POSSIBLE IRREPARABLE INJURY TO OTHER GOVERNMENT AGENCIES WHICH MAY BE ELIGIBLE FOR HYDROPOWER ALLOCATIONS UNDER THE NRA OR OTHER FEDERAL PREFERENCE STATUTES.

The language of the NRA which is the subject of this proceeding is quoted above at page 2. In interpreting this section the Second Circuit has held, as we have said, that "public bodies," those entitled to preference power, includes only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail, not ultimate consumers or brokers. 796 F.2d at 593 (A16). The court cites no case to support its position, for none exists.[8] Important cases of first impression are particularly appropriate for review. *E.g., American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964) (granting certiorari because the question was "an important one of first impression under" a Federal act); *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 733 (1961) ("novel questions"); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 (1947) ("novelty and importance of the principal question").

Moreover, the petitioner is not the only entity affected. Unless corrected, this erroneous restrictive reading of the words "public body" may also be applied in interpreting other similarly worded federal preference statutes, such as the Bonneville Project Act, 16 U.S.C. § 832d, the Flood Control Act, 16 U.S.C. § 825s, and the Fort Peck Project Act, 16 U.S.C. § 833c. If there were already a Circuit Court determination that government agencies under one of the other federal preference acts were entitled to be considered

8. The Second Circuit seemed to rely on its own prior decision in *Power Authority of the State of N.Y.* v. *FERC*, 743 F.2d 105 (2d Cir. 1984) (*"PASNY"*). However, the "public body" question had not been considered in that case. *See MTA* v. *FERC*, 796 F.2d at 589 (A8-A9).

"public bodies" and "preference customers," there would be little question that the Second Circuit's determination would be reviewed as an important "conflict" between Circuits. If the Second Circuit's reading of "public body" is allowed to stand pending such a conflict, certain otherwise eligible consumers may be deprived of a hydropower allocation. As such errors ordinarily do not result in retroactive correction, *see* 796 F.2d at 595 (A19), that would be a permanent loss to the government agency for the year in question. Therefore, here, where the stakes are high and hardship will come to those government agencies which are excluded from preference status, the Court should not wait for review until another Circuit considers the issue and rules otherwise than the Second Circuit has ruled.

III.

THE SECOND CIRCUIT'S INTERPRETATION OF THE NRA VIOLATES THE PLAIN MEANING RULE OF STATUTORY CONSTRUCTION; MOREOVER, IF ANY LEGISLATIVE HISTORY IS TO BE CONSIDERED, IT HAS BEEN MISCONSTRUED.

We appreciate that this Court cannot correct every error made below and that errors alone may not suffice for *certiorari* review. We note, however, that even a brief consideration of the merits here reveals that reversal is warranted. We will outline some of the errors in the opinion below insofar as they impact on the plain meaning rule of construction, and the legislative history relied on by the Second Circuit in respect of its crucial yardstick competition holding. There are other arguments to be made in respect of the legislative history of the NRA, the interpretation of the language of the NRA and the interpretation of federal preference statutes generally, but we will leave them to the brief on the merits.

A. The language of the NRA is clear and unambiguous and the plain meaning rule of construction should have been applied to it.

The Second Circuit stated clearly in its opinion that, literally, the term "public bodies" is not limited to "publicly owned entities that are capable of selling and distributing power directly to consumers of electricity at retail" 796 F.2d at 591 (A12); thus, if the plain meaning rule were adopted the court would have had to come to the conclusion diametrically opposite to the conclusion it reached concerning the MTA and other government agencies. As we have said, no one seriously questions that the MTA is a "public body" in the literal sense.

Since the court did not restrict itself to the plain meaning in interpreting the statute, it must have come to the conclusion that there exists in the legislative history some overriding principle of such clarity and vigor as to overcome the presumption in favor of the plain meaning. We will show below that no such compulsion of clear purpose exists in the legislative history. *See* pp. 14-19

infra. Before we do so, however, we note that in each of the seven cases relied on by the Second Circuit in support of its statutory interpretation, 796 F.2d at 591 (A11-A12), this Court actually *held* that unless there simply was none, the *plain meaning should prevail.* In *United States* v. *Turkette,* 452 U.S. 576 (1981), for example, this Court held that the word "enterprise" in the Racketeer Influenced and Corrupt Organizations Act included both legitimate and illegitimate enterprises. The Court noted that:

> Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate [such a restriction].

Id. at 581. Similarly here, had Congress intended to limit "public bodies" to resellers, it could easily have done so by using the term "municipal utilities" as it has done, for example, in the Department of Energy Organization Act, 42 U.S.C. § 7112(17). It used a much broader phrase here. And the authorities relied on by the court below, taken together, are a powerful argument that in this Court there is a marked reluctance to allow ambiguous legislative history to override plain meaning under the guise of congressional intent.[9]

---

9. In *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council,* 470 U.S. 116, , 105 S.Ct. 1102, 1108 (1985) the word "modify" in the Clean Water Act was thought to be ambiguous, but the Court found that neither the *language* nor the legislative history demonstrated a clear intent to forbid the EPA's variance mechanism. The legislative history was not found at odds with even an ambiguous statute, and a sensible reliance on the EPA's administrative expertise was allowed.

In *Chapman* v. *Houston Welfare Rights Org.* 441 U.S. 600, 608 (1979), the issue was whether the jurisdiction granted Federal district courts over certain civil rights encompassed a claim that a state welfare regulation was invalid. In determining this narrow jurisdictional question there was no plain meaning interpretation involved. But Justice Stevens went out of his way to point out that even if Congress

> never considered the question of federal jurisdiction of claims arising under the broad scope of federal substantive authority that emerged many years later, [that did] not mean that jurisdiction cannot be found to encompass claims nonexistent in 1871 or 1874.

(footnote continued)

There is no exceptional Congressional purpose expressed in the NRA's history here and the Second Circuit has not outlined any valid reason for failing to read the term "public bodies" literally to include government agencies such as the MTA. Indeed, the Second Circuit resolved the issue of the meaning to be given to the words "neighboring states" in this proceeding by utilizing the plain meaning rule, despite the fact that Pennsylvania and Ohio are mentioned throughout the legislative history, whereas

---

(footnote continued)

441 U.S. at 612. The Court went on to point out that new claims must clearly fit within the terms of the statute. *Id.*

In *Griffin* v. *Oceanic Contractors, Inc.* 458 U.S. 564, 571 (1982), the Supreme Court held that where the Jones Act authorized seamen to recover double wages for each day that payment was delayed without cause, the District Court had no discretion to limit the period during which the penalty is assessed. The Court found the statute to be straightforward in its terms, and rejected the view that it should not be interpreted literally to produce a monetary award in excess of an equitable remedy.

In *United States* v. *Locke*, 471 U.S. 84 (1985), the Court held that the Federal Land Policy and Management Act of 1976, which required notice to be filed "*prior* to December 31," was not complied with by notice filed *on* December 31. The Court held that the literal meaning of the statute governed, and refused to hold that the Congressional purpose would also be served by a filing one day later.

In *Bread Political Action Committee* v. *FEC*, 455 U.S. 577 (1982) the Court held that trade associations and political action committees could not bring an expedited challenge to the validity of a section of the Federal Election Campaign Act under § 310(a) of the Act as only parties meeting the literal express requirement of 310(a) could invoke its procedures absent clear evidence that Congress intended to make the procedures available to categories of persons other than these listed in § 310(a). No clearly expressed contrary legislative intention was found.

In *Consumer Product Safety Commission* v. *GTE Sylvania Inc.*, U.S. 102 (1980), Justice Rehnquist, in holding that the Consumer Product Safety Act governs the disclosure of records by the Consumer Product Safety Commission pursuant to an exception in the Freedom of Information Act, stated the now oft quoted position on the plain meaning rule:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

447 U.S. at 64. The opinion then went on to hold that the legislative history failed to establish a reason for deviation.

Massachusetts, Connecticut or Rhode Island are mentioned sparsely or not at all. 796 F.2d at 594-95 (A16-A18). In other words, the court held that, despite the fact that in 1957 Congress thought hydropower could only be transmitted economically to parts of Pennsylvania and Ohio, this should not affect delivery of power to those areas which are *now* within economic transmission distance. It is unfortunate that the Second Circuit failed to see the parallel between the application of the plain meaning rule to "neighboring states" and its application to "public bodies."

Perhaps we, and other intervenors, are also at fault for having engaged in lengthy debates concerning a legislative history which should never have been considered. And perhaps we are falling into the same trap again by responding to the yardstick competition argument now. However, we feel compelled to do so, since the court's reliance on the "yardstick competition" doctrine was conclusive and is so demonstrably wrong.

B. The concept of "yardstick competition" does not require that the MTA be excluded from the preference customer class.

According to the Second Circuit, "yardstick competition" was the *sine qua non* in Congress' adoption of the Niagara Redevelopment Act; hence a preference recipient cannot be an "end-user" of electricity because that would somehow thwart the aim of yardstick competition. We disagree strongly that Congress' principal aim was to establish a "measure" to act as a spur for investor-owned utilities. But the opinion below is based almost exclusively on the assumed existence of a Congressional belief that every preference customer must be a *reseller* of electricity. However, even accepting *arguendo* that the need for yardstick competition must somehow be harmonized with the plain meaning of the NRA, we submit that such compatability can and should be achieved without excluding from the class of "public bodies" government agencies which are end users.

Further, if the Second Circuit is saying that it was Congress' intention to create a competitive marketplace so that regulated

investor-owned utilities would somehow be less greedy, and that this laudable purpose is somehow being frustrated by a literal interpretation of the NRA, then there are additional responses to be considered.

FIRST: The Second Circuit urges that governmental bodies cannot be preference customers because:

> Indeed, if preference power were made available to all government bodies, whether or not they distributed that power to consumers, every town and local library would be entitled to claim a direct share. Niagara hydropower would be spread so thin that any competitive effect it might have had would be lost.

796 F.2d at 592 (A13).

This argument is based on an incorrect understanding of how the allocation process works. Just because a particular government agency is a "public body" does not mean that it would automatically be entitled to receive Niagara hydropower. The Power Authority would still be required to review the request of all potential recipients and allocate 50 percent of the power to preference customers (in and out of state) in accordance with the best use of the cheap power for the residents of the affected area as a whole. There is no requirement that every government agency, (that is, every potentially eligible preference customer) receive the requested amount of power or indeed any power. N.Y. Pub. Auth. L. § 1009. Thus, the feared anti-competitive effect—dilution of the power—just disappears.

SECOND: The Second Circuit then states: "Yardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers." 796 F.2d at 592 (A13). But that is also just not true even if end users were excluded as preference power recipients.

For one reason, the State Public Service Commissions which set the rates of investor-owned utilities do not permit the use of comparative rates, *i.e.*, yardstick competition, in setting rates of investor owned utilities. *See, e.g., Re Consolidated Edison*

Company of New York, 29 PUR 4th 327, 341 (N.Y.P.S.C. 1979); *Re Test Periods In Rate Cases*, 2 PUR 4th 611 (N.Y.P.S.C. 1977).

For another, despite the fact that the Second Circuit seems to believe that Congress decided to have yardstick competition in order to put economic pressure on the investor-owned utilities to encourage them to become more efficient, 796 F.2d at 592 (A13), such economic pressure is of no value today. The court may be saying that when the NRA was enacted in 1957, the investor-owned utilities had benefits which flowed from their larger size and the then-perceived benefits of economies of scale, and that Congress thought that by giving municipal utilities access to somewhat cheaper power it would provide a balance enabling the municipal utilities to compete for consumers on a more equal footing. *Id.* Maybe so, but that goal cannot be achieved today. As we have previously noted (pp. 7-8 *supra*), unlike 1957 when the rates for conventional fuel and hydropower were fairly close and some pressure might be exerted, the disparity in rates is now so great that it would be extraordinarily unreasonable for even the staunchest consumer advocate to expect that, solely by reason of the pressure from competitive municipal utilities rates, a private investor-owned utility could lower its costs to a point where the rates for power generated by conventional or nuclear plants could match or even come close to the per kilowatthour cost of hydropower. This point has been succinctly made by Alfred Kahn, respected former Chairman of the New York State Public Service Commission and Professor of Political Economy at Cornell University (*New York Times*, November 25, 1983, p. 30):

> I have long supported public power as a kind of symbolic, competitive alternative to the private companies. But George Orwell would surely appreciate the claim that these entities' preferential access to half-cent hydropower, while their private counterparts are forced to generate electricity at costs of 5 to 10 cents a kilowatt-hour, provides a yardstick against which to judge the performance of the latter. Some yardstick!

Moreover, with possible *de minimis* exceptions, there is no longer competition among utilities to obtain customers from each other. The desirability of adding new electric load, a possible goal in 1957 when the NRA was enacted, is long gone. Indeed, for the most part, the investor-owned utilities are themselves preaching "conservation" and those utilities that are currently most successful are those which do not have to build new generating plants to meet additional load. E. Erlich, *Are Utilities Obsolete? A Troubled System Faces Radical Change*, Business Week, May 21, 1984, 117, 118, 122.

THIRD: If a comparative economic measure or threat is somehow still required, then the hydropower rates charged to the MTA *by the Power Authority* can be compared with the rates charged by investor-owned utilities for comparable traction service, in exactly the same way that a *municipal utility* rate can be compared with an *investor-owned utility* rate. For example, comparing Long Island Lighting Company's traction rates to portions of the Long Island Railroad to the hydropower rate charged by the Power Authority would be as relevant as a comparison of a rate charged by a municipally owned utility to a user of traction service, and would yield the same yardstick which is sought to be preserved by the Second Circuit, meaningless though it might be. Moreover, if the investor-owned utilities rates are out of line for traction service, any traction customer can petition to be served directly by the Power Authority. No further yardstick influence could be developed if a municipal utility acted as a conduit and the hydropower were first sold to such municipal electric utility, marked up in cost, and then sold to the MTA, a method FERC seems to approve. *Opinion No. 229*, 30 FERC at 61,652 (A66).

FOURTH: Lastly, the Second Circuit reasons that, assuming the MTA is correct that "yardstick competition" makes little sense in today's energy market, it is not for the courts to second guess Congress' basic determination and "[a]ny rectification lies exclusively with Congress." 796 F.2d at 593 (A15). Going to the Congress, however, is not the sole remedy.

It has long been recognized that if the original purpose of an act can no longer be achieved, a court has the duty to interpret the act in a manner which will best serve its underlying purpose. *See*, Llewellyn, *Remarks on The Theory Of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 400 (1950). It is for this reason that a court should

> ask itself not only what the legislation means abstractly, or even on the basis of legislative history, *but also what it ought to mean in terms of the needs and goals of our present day society*. This approach is required by the insuperable difficulties of readjusting old legislation by the legislative process and by the fact that it is obviously impossible to secure an omniscient legislature. [emphasis added]

Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 Vand. L. Rev. 456, 469 (1950); *see also, Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804, 813 (2d Cir. 1966), where the court, in interpreting a Warsaw Convention provision regarding venue, noted that "[c]ertainly the framers were not so remarkably prescient that they foresaw future interline arrangements like those implemented by the International Air Transport Association"; and *Burnet* v. *Guggenheim*, 288 U.S. 280, 285 (1933) where Justice Cardozo suggested that in making legislative interpretations courts and agencies must analyze "[w]hich choice is it the more likely Congress would have made?"

If the question is "what choice would Congress have made if yardstick competition had not been a viable concept at the time of enactment," then we should consider the basic philosophy underlying public power legislation. When enacted, the NRA's marketing policy was, as we have said, a compromise between the public power advocates who wished the power to be marketed under traditional federal preference rules, and private power advocates who wished it to benefit the investor-owned utilities. *See* 103 Cong. Rec. 14439 (August 12, 1957) (Remarks of

Senator Ives); 103 Cong. Rec. 14451 (August 12, 1957) (Remarks of Senator Kerr). If the universe were divided between private investor-owned utilities on one side and "public bodies" on the other, it seems clear that the MTA and other agencies similarly situated would end up on the public side. There is no philosophical reason to believe that the federal preference should exclude a mass transportation government agency and extend only to municipal utilities which resell power to residential, commercial, and industrial retail customers.

IV.

FERC IS REQUIRED TO CONSIDER FEDERAL POLICIES IN FAVOR OF MASS TRANSPORTATION AND ENERGY CONSERVATION IN REVIEWING THE POWER AUTHORITY'S ALLOCATIONS UNDER THE NRA.

The only environmental testimony in the record is that the Power Authority granted the MTA Niagara preference power to keep the total energy costs to the MTA as low as possible and thereby to have a beneficial effect on public transportation and energy consumption, and to reduce pollution. R. 535-36. The minutes of the Power Authority's meeting approving the allocation of the hydropower to the MTA provided that one of the specific purposes is "to encourage mass transit use as a means of reducing dependence on imported oil in the metropolitan New York area." R. 437. Contrariwise, an increase in the MTA's overall power costs for whatever reason, including a diminution of the amount of available hydropower, would have a substantial negative effect on the MTA's ability to maintain the same level of service without increasing fares.[10] To the extent that current mass transportation users would then turn to driving their own cars both pollution and energy consumption would be increased.

It has been held that the Federal Power Act, which created the Federal Power Commission (now FERC) "is not immune from the effects of other subsequent acts of Congress of general application." *Appalachian Power Co.* v. *United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980).

The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (*"NEPA"*) requires that FERC

> to the fullest extent possible. . . . [ensure that] the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA].

10. At the present time, the Power Authority has assigned the MTA 175,000 mwh of interruptible power from the non-preference half of the available hydropower, but the MTA would petition the Power Authority for additional hydropower if it were eligible to be considered a preference customer.

42 U.S.C. § 4332(2).

In enacting the Urban Mass Transportation Act of 1970, 49 U.S.C. § 1601 *et seq.* Congress specifically provided:

> the termination of [mass transportation] service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of substantial number of lower income persons. . . .

49 U.S.C. § 1601(b)(5).

Similarly, in the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 2601 *et seq.*, Congress expressed its concern that the United States consumes over twice as much energy per capita as do European countries, mostly because of the use of cars and trucks.[11] Accordingly, one important element of the national program for energy conservation has been Federal assistance for mass transit.[12]

The Second Circuit responded to the MTA's arguments that FERC ought to consider environmental and mass transportation issues when considering its interpretations of the NRA by saying "Congress' intent controls." 796 F.2d at 594 n.8 (A16). But here where the Congressional intent is inconclusive and there are significant anti-pollution and pro-mass transit policies which also reflect Congressional intent, the NRA should be read in a way which is consistent with all three policies.

FERC argued that there was no environmental consideration involved, citing *City of Santa Clara* v. *Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978), and the Second Circuit adopted FERC's wholly illogical position, as follows:

> Moreover, even if MTA's subways were permitted to buy the cheaper hydropower directly (rather than from a distributor of preference power), other customers would then be forced to use the more expensive fuel claimed to pollute the environment.

---

11. S. Rep. No. 141, 95th Cong. 2d Sess. 7 (1977) *reprinted in* 1978 U.S. Code and Cong. Ad. News 7659, 7676.

12. S. Rep. No. 141, 95th Cong. 2d Sess. 9-10, *reprinted in* 1978 U.S. Code & Cong. Ad. News 7659, 7678-79.

796 F.2d at 593-94 n.8 (A16).

But the situation in the instant case is quite different from the position of the City of Santa Clara. The Ninth Circuit rejected Santa Clara's claim that it should receive low cost power for environmental reasons on the grounds that it did not matter whether Santa Clara or some other preference entity received the power since the power was finite and ultimately additional generating plants would have to be constructed with similar adverse environmental consequences. The court there said:

> [W]e think it highly improbable that one allocation scheme will have a more deleterious impact than any other when the total geographic area served by the CVP is considered. As the court stated (citing authorities) an agency must consider "in deciding whether a major federal action will significantly affect the quality of human environment . . . the absolute quantitative adverse environmental effects of the action itself." No such absolute effects are threatened by the Secretary's decision to allocate CVP power in one way rather than another.

Santa Clara, 572 F.2d at 680 (citations omitted). In the instant case, however, the absolute quantitative adverse impact is quite different depending on whether the MTA or some other entity such as a municipal utility receives the hydropower. The effect on the environment is not the construction of additional generating facilities—because the fossil fuel generated power is available in this geographic area if hydropower is not. Rather, depriving the MTA of the cheap power raises the MTA's expense, diminishes the number of passengers it carries, and immediately results in increased automobile use. Hence, there is an *immediate* cause and effect impact on the environment in terms of increased energy consumption and pollution which would not result if the same amount of hydropower were withdrawn from other consumers.

Moreover, even the Ninth Circuit has modified *Santa Clara* on similar grounds. In *Forelaws on Board* v. *Johnson*, 743 F.2d 677 (9th Cir. 1984), *cert. denied*, U.S. , 106 S. Ct. 3293 (1986), there was a challenge to the Bonneville Power Administration's ("BPA") offer of long term contracts without compliance or

consideration of NEPA. BPA also relied on the *Santa Clara* decision and argued that, as a matter of law, power allocations do not affect the environment. 743 F.2d at 681-82. The Ninth Circuit, however, refused to accept that argument and distinguished *Santa Clara* on the grounds that (i) the long term contract allocations would ultimately "help determine the magnitude of BPA power obligations in the future and thus will have an impact upon long-range region energy plans"; and (ii) the BPA's action "significantly affect[ed] the environment because [it] involve[d] important policy choices affecting energy conservation." 743 F.2d at 682.

FERC, and in turn the courts, have an obligation to harmonize *all* the competing environmental concerns and public policy considerations in favor of mass transportation. The avoidance of a strained construction of "public bodies" pursuant to the NRA would go a long way towards avoiding conflicting federal principles.

CONCLUSION

The Second Circuit's interpretation of the term "public body" in the NRA affects the allocation of vast amounts of a very valuable resource, is a case of first impression, affects governmen agencies under other federal preference power acts, violates the plain meaning canon of statutory construction, completely misinterprets the legislative history, and fails to consider the impact o the statutory construction on mass transportation and the environment. For these reasons, the MTA respectfully requests tha this Court grant the petition for a writ of *certiorari*.

Dated: November 3, 1986

Respectfully submitted,

RENEE SCHWARTZ
Counsel of Record
EZIO SCALDAFERRI
BOTEIN HAYS & SKLAR
200 Park Avenue
New York, New York 10166
(212) 867-5500